APPENDIX

OPINION OF THE COURT OF APPEALS OF KENTUCKY RENDERED: February 2, 1973

COURT OF APPEALS OF KENTUCKY

KENTUCKY STATE BAR ASSOCIATION ..... COMPLAINANT

V.

IN COURT OF APPEALS

JUDY WARD SMITH ..... RESPONDENT

MEMORANDUM OPINION PER CURIAM

This proceeding is the result of a charge instituted against the respondent, Judy Ward Smith, an attorney, by the Kentucky State Bar Association for disciplinary action as the result of her conduct in the handling of an estate on behalf of her client, Sally Fugate.

Also arising out of this matter were three criminal charges against respondent, to wit: (1) Obtaining money under false pretenses, (2) forgery, (3) removing documents from official files. These three charges were disposed of in a plea-bargaining process wherein respondent entered a plea of guilty to the charge of attempting to commit an offense under the laws of the Commonwealth as provided under KRS 431.065. She was sentenced to twelve months in the county jail.

The factual background of what transpired and culminated in the indictments and these disciplinary proceedings is somewhat lengthy and tortuous. How-

ever, we will attempt to state it in an abbreviated form.

Respondent, a practicing attorney in Perry County, Kentucky, in the years of 1969 and 1970, represented Mrs. Sally Fugate, mother of Everett Fugate who died intestate without issue, leaving as his heirs his mother Sally and his wife Odessa Fugate Jones. One of the assets of the estate was a house and lot to which the mother desired to acquire title. To this end she sought the services of respondent. A deed was prepared in respondent's office, which purported to be a judicial deed. This deed was filed in the Perry County Court Clerk's office and later illegally removed from the records. It bore what purported to be the signature of the circuit judge. For the services rendered and as consideration for the settlement of the estate, Sally Fugate issued her check on the Citizens State Bank of Hazard, Kentucky, in the amount of $632.72 to respondent as escrow agent. Respondent's signature appears on the back of this check indicating that she endorsed it when it was cashed.

It developed as a fact in the case that there had been a suit filed in Perry Circuit Court to settle the estate with no steps taken since the institution of the action. The circuit judge had ordered no deed and had signed no deed. Odessa Fugate Jones had not agreed personally or through her attorney to any settlement of the estate. She received no portion of the funds paid by Sally Fugate to respondent as her attorney. In short, the following crimes had been committed. Sally Fugate had been swindled out of $632.72. The

signature of the circuit judge, Don A. Ward, had been forged to a fraudulent court deed, which had been placed on record in the county clerk's office. This same deed had been removed from the records of the county clerk's office. Respondent's defense to this entire matter consisted of a denial that she had anything whatsoever to do with it. In fact, she denies any knowledge of the transaction and asserts that at the time it all took place her husband, who was not a lawyer, was suffering from a brain tumor and was irresponsible and that he more than likely performed all of the acts that are attributed to her.

Her contentions are refuted by the sworn testimony of a large number of witnesses. Sally Fugate testified that respondent prepared all of the papers in question including the check and that the check was delivered to respondent. Rosie Stacy, daughter of Sally Fugate, accompanied her to respondent's office and was present when the check was made out and witnessed the entire matter. Marilyn Burke served as respondent's secretary during the time that the papers in question were being prepared. Also, there is unequivocal testimony in the record by a handwriting expert that the writings involved, without question, are those of respondent. An examination of the writings by this court when compared with the known writing of respondent reveals without question that she prepared the documents. Therefore, in addition to the crimes already committed, an examination of this record shows conclusively that respondent has committed perjury in her attempt to extricate

herself from these charges. Even though the Bar Association has recommended a lesser penalty this court feels that it has no alternative under the circumstances but to disbar respondent permanently from the practice of law in this Commonwealth. Even though we have previously held that once an attorney is adjudged guilty of a felony or a misdemeanor involving dishonesty as defined in Cotton v. Commonwealth, Ky., 454 S.W. 2d 698 the Trial Committee and Board of Governors should not consider testimony which reinquires into the issue of guilt, it has not been held that they cannot and should not examine the facts [out of which a plea of guilty is entered.] It is true that if the defendant pleads guilty to a reduced charge he cannot later insist that he was not guilty of the charge for which he was convicted. In Re Rudd, Ky., 221 S.W. 2d 688; In Re Shumate, Ky., 382 S.W. 2d 405; In Re Carroll, Ky., 406 S.W. 2d 845. However, this does not mean that the Board of Trial Committee in its investigative capacity cannot look behind a plea of guilty especially where plea bargaining is involved in order to determine just what offenses the defendant is or was guilty of.

As previously stated, the trial committee and Board of Governors recommended a lesser punishment than we are here inflicting. Apparently they were somewhat impressed by the fact that respondent's actual conviction was for a misdemeanor and not a felony. We are not so impressed. The offenses are multiple; they are too serious in nature and reflect a degree of dishonesty totally abhorrent to all

principles enunciated in the code of ethics of the legal profession.

We, therefore, order and adjudge that the respondent, Judy Ward Smith, be permanently disbarred from practice of law in the Commonwealth of Kentucky.

ATTORNEYS FOR COMPLAINANT:

Henry H. Harned, Director
Leslie Whitmer
Kentucky State Bar Association
Capitol Building
Frankfort, Kentucky 40601

Frank Coryell
305 Kentucky Home Life Building
Louisville, Kentucky 40202

* * * * * * *

ORDER OF THE COURT OF APPEALS OVERRULING PETITION FOR REHEARING

PETITION FOR REHEARING OVERRULED May 4, 1973

MANDATE

THE COMMONWEALTH OF KENTUCKY

The Court Of Appeals 73 Term—February 2, 1973

Kentucky State Bar Association vs: Judy Ward Smith

Appeal from a judgment of

the Court of Appeals

The Court being sufficiently advised, delivered a per curiam order[ed] confirming report of Board of Bar Governors.

It is therefore ordered the recommendation of the Board be confirmed and respondent, Judy Ward Smith, is hereby permanently disbarred from the further practice of law in this State.

It is further considered that the respondent pay the cost herein expended.

A copy—Attest: /s/ Frances Jones Mills, C.C.A.

By....., D. C.

Issued Friday, May 4, 1973

* * * * * * *

ORDER OF THE COURT OF APPEALS SUSPENDING EXECUTION OF THE MANDATE

COURT OF APPEALS OF KENTUCKY

KENTUCKY STATE BAR ASSOCIATION
COMPLAINANT

VS. IN COURT OF APPEALS

JUDY WARD SMITH RESPONDENT

ORDER SUSPENDING EXECUTION
OF MANDATE

On motion of Judy Ward Smith the execution of this Court's mandate, issued May 4, 1973, is suspended for a period of time to and including August 20, 1973, to permit her application to the Supreme Court of the United States for review of this Court's opinion.

Palmore, C. J., Osborne, Steinfeld and Stephenson, JJ., sitting. All concur.

ENTERED May 22, 1973.

/s/ C. J. Palmore, Chief Justice

* * * * * * *

RULES OF THE COURT OF APPEALS OF KENTUKY

3.130—Code of Professional Responsibility Recognized as Authority—The Court recognizes and accepts the principles embodied in the American Bar Association's Code of Professional Responsibility as a sound statement of the standard of Professional conduct required of members of the bar, and the Board may cause to be tried all charges brought under this code as well as charges for other unprofessional or unethical conduct calculated to bring the bench and bar into disrepute.

3.140—Initiation of Disciplinary Cases—When it comes to the attention of the Board or any officer that an attorney may have been guilty of unprofessional conduct, or has been complained against for such conduct, the matter shall be reported to the President who shall cause such investigation to be made, as may be necessary and he shall cause notice of the pendency of the complaint to be given to the attorney involved who shall have fifteen days within which to respond thereto.

3.150—Investigations and Trials to be Prompt—All investigations and the trial of all disciplinary cases shall be begun, prosecuted and completed as promptly as the ends of justice will permit. Neither the unwillingness of the complainant to prosecute, nor an offer of settlement, compromise or restitution shall delay the investigation, trial or report to the Board.

3.160—Unfounded Complaints—If the President deems any accusation, letter or complaint against an attorney unfounded, he may withold action thereon until the next meeting of the Board at which time he shall submit the matter to the Board. Except in cases where a fee or deposit for costs has been paid in advance to an attorney by a client, a complaint which is based solely upon an attorney's failure to answer letters, or to do so punctually, or to prosecute the business of the attorney's client with such speed or diligence as the latter expects or desires, shall be deemed unfounded and the President without referring the matter to the Board, may decline to entertain it and direct the Director to return the complaint to the person from whom received with a letter of explanation. When a complaint which the President deems to be unfounded is by him referred to the Board, the Board may, without investigation, decline to entertain the complaint and direct the Director to return the same to the person from whom received with a letter of explanation.

3.170—Proceedings not Public: Exception — Nothing connected with a disciplinary case shall be made public unless ordered by the Court.

3.180—Charges; Form; by Whom and Where Filed—If the Board determines, by a majority vote, that a complaint should be tried, a charge shall be prepared stating the name and present or last known address of the attorney and facts alleged to constitute unprofessional conduct. The charge shall be signed by the President or such officer of the Association as

the Board may authorize and filed in the office of the Director.

3.190—Appointment of Trial Committee; its Powers and Qualifications—If the pleading present any issue of fact, the President shall appoint a Trial Committee composed of three members of the House of Delegates one of whom shall be named Chairman, and none of whom resides or has his office in the same judicial district as the respondent. The chairman shall possess the qualifications and powers of a circuit judge under a commission from the Chief Justice. The Director shall immediately notify each member of the Trial Committee of his appointment, and shall furnish each with a copy of the pleadings.

3.200—Notice of Appointment of Trial Committee and Hearing—Upon the appointment of a Trial Committee the Director shall notify the parties of the names and addresses of its members. The Chairman of the Trial Committee shall fix the time and place of the hearing and the Director shall give notice thereof to the parties. Such hearing shall be not less than twenty days after the date of the notice.

3.210—Challenge to Qualifications of Trial Committee—Any time, not later than ten days before the date set for hearing the respondent may, by motion, challenge for cause any member of the Trial Committee. If the challenge is such as might disqualify a circuit judge the President shall relieve the challenged member and immediately fill the vacancy.

3.220—Joinder and Consolidation—

(a) Any number of acts or omissions, and any number of separate and distinct transactions, alleged to constitute unprofessional conduct on the part of an attorney may be alleged in a single charge in separate counts. Separate charges may, by order of the Board, be consolidated and tried as a single disciplinary case.

(b) A charge may be filed against two or more attorneys if based on the same or related state of facts and separate charges against two or more attorneys based upon the same or related state of facts may, by order of the Board, be consolidated and tried as a single disciplinary proceeding. Where two or more attorneys are proceeded against in the same proceeding the Trial Committee shall make a separate report to Board as to each.

3.230—Notice of Filing Charges; Time to Answer—Upon the filing of a charge the Director, by certified mail return receipt requested, shall furnish the respondent with a copy of the charge and notify him:

(a) Of the name and address of the attorney for the Association.

(b) That he must within twenty days after receipt of the notice file his answer and three copies with the Director and serve a copy of the answer on the attorney for the Association.

3.240—Absent Respondents; Appointment of Attorney--If the copy of the charge and notification, mailed to the respondent as required by RCA 3.230, is undelivered and returned to the Director, the President shall, by order, appoint an attorney for the respondent. The Director shall furnish such attorney copies of the order appointing him to represent the respondent, the charge and the notification. It shall be the duty of an attorney so appointed to exercise reasonable diligence to notify the respondent personally or by mail of the nature and pendency of the charge against him. Not less than thirty days nor more than fifty days after his appointment, the attorney appointed for the respondent shall file a report stating what efforts he has made to locate and notify the respondent and whether the respondent has been apprised of the charge. If the report of the appointed attorney states that he has caused the respondent to be notified of the nature and pendency of the charge, no further duty shall be required of the attorney. If the report does not so state, it shall be the further duty of the appointed attorney to attend the hearing before the Trial Committee and thereat to represent the respondent, however, he shall not be required to make a factual investigation of the charge. A respondent for whom an attorney is appointed, as herein provided, shall be deemed to have been constructively summoned on the thirtieth day after the date of the order appointing his attorney. He may file an answer within twenty days after the date on which he shall have been deemed to have been constructively summoned.

3.250—Pleadings and Preliminary Motions—There shall be a charge and answer and, when permitted by the Trial Committee, a reply and such amendments to pleadings as may be required to serve the ends of justice. Averments in an answer or a response shall be taken as denied or avoided. No preliminary motions may be filed except:

(a) For a more definite statement of the charge or answer.

(b) Challenging the qualifications of the Trial Committee as provided by RCA 3.210.

3.260—Filing and Processing of Pleadings and Other Papers—After a charge is filed and before any proceedings are instituted in the Court, an original and three copies of all further pleadings, notices, motions, orders and briefs shall be sent to the Director who shall file the original and forward one copy to each member of the Trial Committee. All other reports, inquiries, letters, letters of transmittal and other communications shall be sent to, and processed by, the Director. No such paper or copy thereof shall be sent, or on behalf of any party of the Court, the Board, the Trial Committee or any member thereof.

3.270—Service of Pleadings and other Papers—A copy of any pleading after the charge and of any notice, motion, order and brief shall be served by counsel upon each other counsel of record in the proceeding.

3.280—Rights of Respondent Against Whom a Charge has Been Filed — The respondent against whom a charge has been filed shall have the right to be represented by counsel and entitled to a hearing before a Trial Committee. He shall have all the rights secured to a party by the Rules of Civil Procedure with respect to the introduction of evidence, the right to compel the attendance of witnesses; and the production of books, papers and documents or other writings except those contained in the investigative file of the Board. He shall have the right to an oral argument or to file a brief before the Trial Committee. He shall be afforded a full opportunity to remain silent, to defend himself by the introduction of evidence and to cross-examine witnesses called against him. If the respondent be unable to employ counsel, the President, upon written request in affidavit form, made within twenty days after service of the charges, shall appoint counsel for the respondent.

3.290—When Charge May be Taken as Confessed —The Trial Committee may take the allegations of the charge as admitted or confessed if a respondent, who is notified of the charge by the Director in accordance with RCA 3.230 or who receives notice of the charge from his attorney appointed in accordance with RCA 3.240, files an answer admitting the charges or fails to file an answer within the time provided in these Rules. The Trial Committee, in its discretion, may receive such evidentiary material as may be of assistance in making its recommendation to the Board.

3.300—When Charge Shall not be Taken as Confessed—No charge against a respondent shall be taken by the Trial Committee as confessed when the respondent shall have been constructively summoned under RCA 3.240, unless the report of the respondent's appointed counsel states that he has caused the respondent to be notified of the nature and pendency of the charge.

3.320 — Mental Disability After Misconduct Charged—If, after a charge of unprofessional conduct has been filed against an attorney, the Trial Committee has reason to believe and, after a hearing before that committee, finds that the respondent is of unsound mind, mentally ill, mentally defective or for whom a committee has been appointed or addicted to intoxicants or drugs to such an extent that, in the judgment of the trial committee, he is incapable of conducting a proper defense to the charge against him, the Trial Committee shall recommend to the Board and the Board shall recommend to the Court that the respondent be suspended from the practice of law. If the Court orders his suspension, it shall also direct that all further proceedings on the charge be held in abeyance until it shall appear to the Court, upon application made by the respondent, that he is mentally capable of conducting a proper defense to the charge in question; therefore, a hearing on the charge shall be held as provided by the Rules relating to disciplinary cases. If the Trial Committee concludes that the charges have not been sustained, or, having been sustained, do not warrant suspension or

disbarment, then the respondent shall be restored to membership in the Association if and when he has satisfied the Trial Committee, the Board and the Court by clear and convincing evidence that he has been so completely cured of such insanity, mental illness, mental defectiveness, or addiction that there is little or no likelihood of a recurrence of the condition.

3.330—Procedure When Attorney has been Convicted of an Offense Involving Moral Turpitude — Whenever it shall come to the attention of the Board that an attorney has been convicted of an offense involving moral turpitude, it shall order the Director to promptly obtain a certified copy of the judgment of conviction. The Board shall direct that a charge be filed against such attorney. If an answer is filed from which it appears that facts or circumstances may exist which would be in mitigation of the offense or of the discipline which may be imposed, the Board may order the appointment of a Trial Committee and the Board shall by order confine the issues to be considered, and the evidentiary material to be received.

3.340—Procedure When Pleadings Present Only an Issue of Law—If the pleadings only present issues of law the Board shall fix a time for the filing of briefs. Thereafter the Board shall consider the briefs and report its recommendation to the Court.

3.350—Order of Proceedings and Burden of Proof —The Trial Committee shall determine and regulate the order of proceedings at the hearing. Upon the

application of a party or upon direction of the Trial Committee the Director shall issue subpoenas for the attendance of witnesses or the production of evidence. The burden of proof shall rest upon the Association in a disciplinary proceeding and the facts must be proven by a preponderance of the evidence. In reinstatement hearings the burden shall rest upon the applicant. Before submission the Trial Committee may direct such oral argument as it deems appropriate and receive briefs from all parties on such terms as it may impose. After submission of the case to the Trial Committee there shall be no further oral argument or briefing either before the Trial Committee or before the Board.

3.360—Introduction and Admissibility of Evidence, Evidence Taken in Other Proceedings—The testimony at all hearings shall be in person, except that the parties may use depositions under the same standards as those prescribed by the Kentucky Rules of Civil Procedure. The rules of evidence applicable in civil actions shall apply.

Where, in any proceeding, evidence has been taken under oath upon due notice to the Respondent, and at the taking of which Respondent has appeared, either in person or by counsel, or as attorney for any party, a duly certified transcript of all, or the essential portions, of such proceedings may be used as evidence in any hearing provided for in RCA 3.200, or in any investigation antecedent to or in connection with any disciplinary case in-

volving the same charge or any charge growing out of matters connected therewith, and such transcript and record, or parts thereof, may be made a part of the record on any hearing or investigation.

3.370—Transcript of Evidence—The proceedings before the Trial Committee shall be reported by a reporter appointed by the Trial Committee. However, after hearing, if the Trial Committee is of the unanimous opinion that the respondent should only be administered a private reprimand or that all charges should be dismissed the Trial Committee may, with the consent of the parties, direct the reporter to preserve all notes of the hearing but defer a transcription of the record until ordered by the Board to prepare such transcript. In all other proceedings the testimony shall be transcribed.

3.380—Trial Committee to File Report With Board—When a disciplinary proceeding has been finally submitted, the Trial Committee shall promptly file with the Board the entire transcript of the proceeding, the transcript of testimony together with such briefs as may have been filed and a written report in the nature of a findings of fact and conclusion of law, which shall contain a concise statement of:

(a) the charges made against and the defense offered by the respondent;

(b) the proceedings had;

(c) the facts which the Committee deems proven

by a preponderance of the evidence, the Committee's conclusions; and

(d) its recommendations as to the disposition of the case.

The Trial Committee's report shall constitute a part of the record in the case and a copy of such report shall be served upon counsel for the parties. The report shall be advisory.

3.390—**Board's Action on Trial Committee's Report**—Upon receipt of report of the Trial Committee the Board, except the Chairman and Chairman-elect who shall have no vote in any disciplinary proceedings, shall promptly consider and act upon the entire record. The Board shall decide, by a roll call vote, whether the respondent is guilty or not guilty. If the respondent be found not guilty, the Board's action is final. If the respondent be found guilty, the Board shall then decide, by a second roll call vote, the disciplinary action to be recommended. Both the finding of guilty and the disciplinary action to be recommended must be agreed upon by a majority of the members of the Board entitled to vote in disciplinary proceedings. The result of each of the two votes shall be recorded in the Board's minutes. The President shall sign and file with the Director an order setting forth the Board's action and the Director shall mail copies of such order to the parties and to each member of the Trial Committee. If discipline is ordered by the Board or recommended to the Court a copy of the order shall be filed with the Clerk. Any order recommending to

the Court that disciplinary action be taken shall be advisory. Promptly after the filing of the order of the Board the Director shall file with the Clerk the entire record commencing with the charge and a certified bill for the costs and expenses incurred by the Board and the Trial Committee in the investigation preliminary to and in the conduct of the proceedings.

3.400—Degrees of Discipline—Upon a finding by the Board of guilt of unprofessional conduct, discipline may be administered by way of private reprimand issued by the Board without further proceedings or right of appeal to the Court; or, by the Court, upon recommendation by the Board, by way of public reprimand, censure, suspension from practice or disbarment. If a private reprimand is issued, it shall not be made public and shall be transmitted only to the respondent, or to his attorney, and to the attorney for the complainant.

3.410—Rehearing by Trial Committee or Board—Rehearing shall not be permitted except for newly discovered evidence so material to the rights of either party as to affect the finding and recommendation which could not have been discovered by the exercise of reasonable diligence and then only if such evidence is first presented in affidavit form, together with the affidavit of counsel that such evidence could not have been discovered sooner by the exercise of reasonable diligence. After the Trial Committee has made its report to the Board, no rehearing shall be permitted by the Trial Committee. After the Board

has determined the guilt or innocence of the respondent and the discipline to be imposed by it or recommended to the Court, no rehearing shall be permitted by the Board. After the Board has filed its order under RCA 3.390 the Court may remand the case to the Board with directions that the Trial Committee receive further evidence upon such matters and to such extent as the Court may direct.

3.420—Procedure in the Court—Promptly upon the filing of the order as provided in RCA 3.390, the Clerk shall advance the case on the docket and shall forthwith issue a rule against the respondent returnable within twenty days after service of the rule, requiring the respondent to show cause why he should not be adjudged guilty of unprofessional conduct and disciplined therefor. When the respondent is proceeded against by warning order, the rule shall be deemed to have been served thirty days after the date of the making of the warning order. If response is not filed when due the Court shall enter judgment against the respondent, adjudging him guilty of unprofessional conduct and disciplining him. When a response is filed, the respondent shall furnish a bond with surety acceptable to the Clerk, conditioned that if the principal in the bond be disciplined by the Court, he will promptly pay all costs incurred in the proceedings, including those certified under RCA 3.390. If he files his response in forma pauperis no bond shall be required.

3.430—Attorney General May Represent the Board—The Attorney General of Kentucky, upon request, shall act as counsel for the Association. In all cases the Board may appoint special counsel.

3.440—Duty to file brief—If respondent timely files response it shall be supported by a brief and the Board shall have thirty days thereafter to file its brief.

3.450—Disposition of Case—Upon submission of the case the Court will enter such orders as it may deem proper. The provisions of the Rules regarding petition for rehearing and issuance of a mandate shall apply. The Clerk shall promptly furnish a copy of the order of disposition to all parties and the Director. Every such order except those for private reprimand, shall be published as are other opinions of the Court and an attested copy shall be forwarded by the Clerk to the circuit clerk who shall record the attested copy in the Commonwealth Order Book and index the same.

3.460—Recovery of Costs—Every final order of the Board or the Court which adjudges the respondent guilty of unprofessional conduct shall provide for the recovery of all costs, including those certified under RCA 3.420. Immediately upon the effective date of the order the Clerk shall furnish a cost bill to the respondent, and if the bill is not satisfied within ten days thereafter, the Clerk shall issue one or more

executions thereon, directed to the sheriffs of the counties in which the respondent and the sureties on his bond reside. So much of the costs collected by the Clerk as represent those incurred by the Board shall be promptly refunded to the Association.

* * * * * * *

CHARGE AGAINST PETITIONER
March 29, 1971

COURT OF APPEALS OF KENTUCKY

KENTUCKY STATE BAR ASSOCIATION
COMPLAINANT

v. CHARGE

JUDY WARD SMITH RESPONDENT

* * * * * * * *

Comes now the Kentucky State Bar Association, by and through its Board of Governors, and states that respondent, Judy Ward Smith, whose last known address is 12 Highland Drive, Bowling Green, Kentucky, a member of said Association did engage in the following conduct:

About May 14, 1971, respondent was convicted in the Perry County Kentucky Circuit Court, upon her plea of guilty, of the charge of an attempt to commit an offense under the law of the Commonwealth of Kentucky as provided by KRS 431.065. A true and correct copy of an order evidencing the plea of guilty is appended hereto marked Exhibit "A" and made a part hereof.

WHEREFORE, complainant charges that such facts and actions on the part of respondent constitute unethical and unprofessional conduct; that the same are calculated to bring the bench and bar of Ken-

tucky into disrepute; and that discipline of an appropriate degree should be administered to the respondent in accordance with RCA 3.400.

KENTUCKY STATE BAR ASSOCIATION
By: Allen Schmitt, President

H. H. Harned, Director
/s/ H. H. Harned, Director

CRIMINAL ORDERS

PERRY CIRCUIT COURT

MAY TERM, 3rd Day, 6th Day of MAY, 1970

COMMONWEALTH OF KENTUCKY
PLAINTIFF

VS: NO. 2304 — OBTAINING MONEY UNDER FALSE PRETENSES

JUDY WARD SMITH DEFENDANT

* * * * * *

This cause came on for trial. Came then Commonwealth and announced ready. Defendant represented by Hon. Alva A. Hollon waived formal arraignment and entered a plea of not guilty, whereupon came the following jury to-wit: Mrs. Floyd Baker, Carolyn Wells, Mrs. Zack Anderson, Ellis Grigsby, Helen Napier, Elmer Whitaker, Mildred Epperson, Matilda Hobbs, Corbett Brashear, Vilas Grigsby,

John Gross and Amos Ison. Came then Defendant and changed her plea to guilty of the crime of Attempting to Commit a Felony, waived a jury trial and asked the Court to fix her punishment. Came then Commonwealth Attorney and made recommendation defendant be given one year in the County Jail and probated.

/s/ STEPHEN COMBS, JR. SPECIAL JUDGE

STATE OF KENTUCKY
COUNTY OF PERRY

I, Grace Holliday Strong, Clerk of the Perry Circuit Court certify that the above and foregoing is a true and correct copy of the Order of Trial in the matter of Indictment No. 2304, Commonwealth of Kentucky vs. JUDY WARD SMITH as appears of record in my office in Criminal Order Book No. 50 at page 631.

WITNESS my hand and official seal this the 23rd day of March, 1973.

GRACE HOLLIDAY STRONG,
Clerk, Perry Circuit Court
By Carrie Holliday, D.C.

* * * * * * *

RESPONSE OF PETITIONER TO CHARGE

COURT OF APPEALS OF KENTUCKY
KENTUCKY STATE BAR ASSOCIATION

COMPLAINANT

VS: RESPONSE

JUDY WARD SMITH RESPONDENT

Comes now the Respondent, Judy Ward Smith, and states as following the Response to the Charge filed herein:

I

Respondent admits the material allegations of Paragraph I of the Charge filed, but denies that they occurred on May 14, 1971.

II

Respondent states that restitution in the amount of $641.22 (Six hundred forty-one dollars and twenty-two cents) was made to Mrs. Sally Fugate, Hazard, Kentucky, and evidence of said restitution is hereby attached, being witnessed by Commonwealth Attorney Tolbert Combs and Mrs. Rosa Stacy, daughter of Mrs. Fugate. Respondent declares that at no time was it her intent that Mrs. Fugate should be defrauded or deceived as to her just share in her deceased son's estate, in which matter Respondent represented

Mrs. Fugate in Perry Circuit Court. Respondent states that the distributive rights of Mrs. Fugate were not damaged, injured, harmed, or prejudiced, and that settlement of said estate was still pending at time of Respondent's plea.

III

Respondent states that she did not receive or cash the alleged check involved in this matter, that the bank teller whose number appears on the check did not recall her cashing said check, that respondent did not maintain a bank account with said bank but that Respondent's late husband did maintain an account there, and had upon different occasions taken checks of Respondent's to the bank for cashing; that subsequent to return of the indictment, Respondent's husband and she separated after intimation from him that he had seen to it that "Respondent would not practice law very long in the state of Kentucky." Respondent states that, unknown to her at this time, her late husband was suffering from malignant pituitary tumor pressing on the brain, causing acute change of personality, evidenced by irrational behavior and extreme jealousy of her.

IV

Respondent states that her alleged involvement in the political situation in the Perry Circuit Judge's race ripened the minds of members of the Grand Jury as to the return of said indictment; and that said indictment was an avenue of reprisal against the Re-

spondent. Respondent attaches a photocopy of an article from The Courier-Journal and Times, dated January 16, 1970, as background of this situation. Respondent contends that inspite of the fact that the suit was withdrawn, damage to Respondent's professional reputation was accomplished. The Chairman of the Grand Jury when the indictment was returned was Mrs. Ann Medaris, close personal friend of Hon. Garland Wells, son of candidate Hon. Courtney C. Wells, and also attorney for Mrs. Odessa Fugate Jones, Administrator of said estate mentioned in Paragraph II of this Response, and co-worker of Mrs. Garland Wells.

WHEREFORE, Respondent states that she has done all that she could to rectify this matter, both as to her client, and as to her professional conduct before the Bar. This is the first claim ever against Respondent's record of responsibility as a citizen for 28 (twenty-eight) years, and as an attorney for 3 (three) years. Respondent's honor and good name are all that she has to give her 3 (three) year old son. Accordingly, she prays the mercy of the Court in its decision.

Dated: 4-18-71

/s/ Judy Ward Smith
RESPONDENT

* * * * * * *

REPORT OF TRIAL COMMITTEE
May 23, 1972

COURT OF APPEALS OF KENTUCKY

KENTUCKY STATE BAR ASSOCIATION
COMPLAINANT

VS. SUMMARY, FINDING OF FACTS
CONCLUSIONS AND
RECOMMENDATION

JUDY WARD SMITH RESPONDENT

* * * * * *

The Complainant, Kentucky State Bar Association, initiated charges against the Respondent, Judy Ward Smith, subsequent to her conviction, on May 6, 1970, in the Perry County, Kentucky, Circuit Court, on her plea of guilty to the charge of an attempt to commit a felony, a misdemeanor under the law of the Commonwealth of Kentucky, as provided by Kentucky Revised Statutes 431.065.

The Respondent admitted the above allegations, but denied they occurred on May 14, 1971, as set out in Complainant's Complaint.

A pre-trial conference was held on June 4, 1971, at Suite 601 Republic Building, Louisville, Kentucky, at which time the Respondent appeared without counsel, preferring to represent herself. The Complainant was represented by attorneys, Frank Coryell and Les-

lie G. Whitmer, and the Trial Committee was composd of Durward W. Maynard, Chairman, Messrs. John T. Ballantine and Wallace H. Spalding, Jr., as Members.

At this conference, the Respondent advised the Committee that she was prepared to testify without further delay, and after being informed by the Committee of her right to remain silent, to have counsel, to call witnesses, and that anything she said could be considered, either for or against her, she proceeded to give her testimony, after being duly sworn to tell the truth. Unfortunately, the stenographic notes for of this hearing were accidently destroyed before being transcribed, thus, a re-hearing was held on October 8, 1971, at the office of Mr. Joseph Soergel, Court Reporter, 310 West Liberty Building, 310 West Liberty Street, Louisville, Kentucky, at which hearing the same persons mentioned above were present, and at which time the Respondent was again advised of her constitutional rights before she proceed[ed] to testify.

SUMMARY OF PROCEEDINGS

The Respondent, represented a Mrs. Sallie Fugate, mother of Everette Lee Fugate, who died intestate, a resident of Perry County, Kentucky, without issue Everette Lee Fugate was the husband of Mrs. Odessa Fugate Jones, who remarried, and is referred to in the record as Mrs. Odessa Fugate Jones, in the settlement of her deceased son's estate.

One of the assets of the said estate was a house and lot which adjoined the property of Mrs. Fugate, which she wanted as her share of her son's estate. Mrs. Odessa Fugate Jones had been appointed as the Administratrix of her said husband's estate, and appears to have made no effort to settle the same, which resulted in Mrs. Sallie Fugate employing the Respondent to file a settlement suit in the Perry Circuit Court. The filing of this suit greatly upset the said Administratrix, resulting in an argument between her and her mother-in-law, Mrs. Sallie Fugate. The Respondent testified, that in August of 1969, Mrs. Sallie Fugate, called her on the telephone and stated that she had reached an agreement with Odessa Fugate Jones about the said real estate, and instructed her to prepare a deed for her to take to Dayton, Ohio, for Mrs. Odessa Fugate Jones to execute. The Respondent further testified that she prepared the deed which was picked up at her office by Mrs. Sallie Fugate and her daughter, Mrs. Rosie Stacy, and that was the last she heard of the matter until February, 1970, when she was indicted by the Grand Jury of the Perry Circuit Court for obtaining money from Mrs. Sallie Fugate under false pretenses, forgery and removal of Court records.

The Transcript of Evidence heard before the said Grand Jury (Exhibit 6) revaels that both, Mrs. Sallie Fugate and her daughter, Mrs. Rosie Stacy, testified that when they went to the office of the Respondent to pick up the aforesaid deed, Mrs. Sallie Fugate

gave the Respondent a check for Six Hundred Thirty Two Dollars and Seventy-two Cents ($632.72), to purchase the interest of Odessa Fugate Jones, in and to the aforesaid real estate, which check included Respondent's fee for services rendered in the sum of One Hundred Fifty ($150.00) Dollars. Mrs. Rosie Stacy further testified that while she and her mother, Mrs. Sallie Fugate were at Respondent's office as aforesaid, that her mother signed the check and requested the Respondent "to make it out and Judy put it in her name." (See Pages 45 through 49 of said Grand Jury Transcript of Evidence). The check referred to above was filed with Respondent's Deposition, and for identification, is marked "Exhibit 1". While the said Odessa Fugate Jones did not testify before the said Grand Jury, her attorney, Mr. Garland Wells, testified that Odessa Fugate Jones told him that she did not receive any money for the purchase of the said real estate from the Respondent.

The said Transcript of Evidence, further revealed that two checks were involved in the estate of said decedent, Everette Lee Fugate—the one mntioned hereinabove for $632.72, dated and cashed at the Citizens State Bank, Hazard, Kentucky, on August 22, 1969, and another check in the sum of $8.50, written on October 24, 1969, to the Respondent "for legal services, estate of Everette Lee Fugate, and indorsed by J. Ward Smith, and deposited at the Citizens State Bank", making a total of $641.22 involved, and being the exact amount that restitution was made to the said Mrs. Sallie Fugate by the Respondent, however,

the indictment by the said Grand Jury mentioned only the check in the sum of $632.72. The Trial Committee did not see or examine the said $8.50 check.

Various documents were admitted in evidence at the pre-trial hearing as being the handwriting of the Respondent, Judy Ward Smith, and other documents were admitted in evidence as the alleged handwriting of Respondent's deceased husband, James Allen Smith.

The Complainant produced Mr. Maxwell Allen, who was qualified and testified as an expert witness by agreement with the Respondent for reasons mentioned hereinbelow.

The said witness testified that on May 6, 1970, he appeared in the law offices of Respondent's attorneys in Hazard, Kentucky, for the purpose of testifying for the Respondent on the charges for which she was to be tried on that day in the Perry Circuit Court; that after he had examined some check or checks purportedly to be used as evidence in the prosecution of said charges against the Respondent, with other known specimens of her handwriting on checks or miscellaneous papers that he compared them with at the time, and after he had examined the purported originals to study the line quality, he advised one of Respondent's attorneys that he would be unable to help the Respondent after his analysis; that he would have to make some very damaging concessions on her part, and as such he was not used as a witness; that based upon his experience, education and examination

the purported signatures and handwriting of the Respondent compared favorably with the signatures on the checks in question. (See Transcript of Mr. Allen's Deposition, Pages 3, 4, and 5).

The Respondent, Judy Ward Smith, took the stand in her own defense, and testified that she represented Mrs. Sallie Fugate in the matter of her said deceased son's estate, and filed a settlement for her in the Perry Circuit Court; that she did not prepare the deed that was put to record in the office of the County Court Clerk of Perry County, Kentucky, (Exhibit 4, Respondent's Deposition); that her said client picked up the aforesaid deep at her office in August, 1969; that she filed her accounting of the estate with the Court, and sent Mrs. Sallie Fugate a billing of her services, which was never paid, and that was the last she had heard of the "whole thing" until she was indicted by the said Grand Jury in February, 1970.

The Respondent further testified that she did not have an account with the Citizens State Bank in Hazard, Kentucky, and that she did all of her banking with the Peoples Bank in Hazard, Kentucky.

The Respondent further testified that she did not prepare, indorse or ever see the said check for $632.72 until after the said indictments, and that it was her belief that the said money was obtained from Mrs. Sallie Fugate by her late husband, James Allen Smith, who died on August 29, 1970; that he was suffering from a pituitary tumor, and was not employed, hav-

ing lost his job in December, 1968, for taking funds from his employer; that he was extremely jealous of her and their young son; that he told her after the said indictments that he had fixed her from practicing law much longer in Kentucky, and that she had filed divorce proceedings against him the Warren Circuit Court in March, 1970.

The Respondent further testified that she appeared in the Perry Circuit Court on May 6, 1970, for trial, and the Commonwealth's Attorney stated to her that he would move to dismiss the charges of forgery and removal of Court records, if she would agree to plead to an amended charge of attempting to commit a felony on obtaining the money from Mrs. Sallie Fugate; that on the advice of counsel and upon her own assessment of the situation of having no witnesses or anyone to back her up, she entered a plea to the amended charged and reimbursed Mrs. Sallie Fugate the sum of $641.22. (See Respondent's Deposition, Pages 4 through 12).

FINDINGS OF FACT

This Committee makes the following findings and believes, established by a preponderance of the evidence:

1. That the Respondent prepared the check dated August 22, 1969, drawn on the Citizens State Bank of Hazard, Kentucky, and made payable to herself as Escrow Agent, which check was signed by Mrs. Sallie Fugate, in the sum of

$632.72. (See Exhibit 1, Respondent's Deposition)

2. That the indorsement on the back of the said check was affixed by the Respondent.

3. That no part of the proceeds of the said check were ever paid by the Respondent to Mrs. Odessa Fugate Jones for her right, title and interest in and to the said real estate of her deceased husband, Everette Lee Fugate.

CONCLUSIONS

1. Under Kentucky State Bar Association vs. Lester, Ky., 437 S.W. 2nd 958 (1969), the Perry Circuit Court conviction of the Respondent, Judy Ward Smith, "forecloses further inquiry into the issue of respondent's guilt or innocence of the offense." 437 S.W. 2d at 959.

2. Even if inquiry were made into Respondent's guilt or innocence, the findings above demonstrate the Committee's conclusion that Respondent was guilty of the charge of obtaining money under false pretenses.

3. The misdemeanor to which Respondent pleaded guilty was so intertwined with, and such a violation of a lawyer's high ethical obligations to a client and the client's money and property that the offense clearly involved moral turpitude.

4. In the eyes of the public a lawyer convicted (whether on a plea of guilty or otherwise) under the circumstances of this case will bring the bench and bar of Kentucky into disrepute, because to the uneducated layman, the technical terminology of conviction is not significant. What is significant is that in the public eye, a lawyer has now been convicted in a criminal proceeding involving misuse or misappropriation of a client's money. (In this connection, the Respondent herself recognizes that "there is a strong layman's presumption of guilt against an attorney accused of taking money from a client." — Respondent's Brief, Page 7) What better admission of the fact that her conviction will bring the bench and bar into disrepute?

RECOMMENDATION

Such actions cannot be condoned on the part of any professional man or woman, and certainly cannot be overlooked by one sworn to upheld the law as an officer of the Court. Not only is such conduct unethical, it is obviously criminal, however, some consideration must be given to the following mitigating circumstances in Respondent's favor, which would tend to temper the Committee's recommendation with some mercy, with the hope that never again will the Respondent betray the trust imposed upon her as a member of the legal profession:

1. Her inexperience as a nattorney. (Three years practice)
2. The physical infirmity of her husband, James Allen Smith, during said period, which resulted in his death.
3. Consideration of the fact that the Respondent now has the responsibility of rearing and education of an infant son of her marriage.
4. Having made full restitution to her client, Mrs. Sallie Fugate.
5. Her previous good character and conduct, both as an individual and attorney.

WHEREFORE, in view of the above findings, tempered by the foregoing mitigating circumstances, your Committee must, in good conscience, recommend that the Court of Appeals order that the Respondent, Judy Ward Smith, be suspended from the practice of law for a period of three (3) years from the date of this Report.

Respectfully submitted this 23rd day of May, 1972.

/s/ Durward W. Maynard
Durward W. Maynard
Chairman of the Trial Committee

/s/ John T. Ballantine
John T. Ballantine
Member of the Trial Committee

/s/ Wallace H. Spalding, Jr.
Wallace H. Spalding, Jr.
Member of the Trial Committee

FINDINGS AND RECOMMENDATIONS OF BOARD OF GOVERNORS OF THE KENTUCKY STATE BAR ASSOCIATION
July 14, 1972

MEETING
BOARD OF GOVERNORS
RAMADA INN
LOUISVILLE, KENTUCKY

JULY 14, 1972

The next order of business concerned the charge against Judy Ward Smith. The Trial Committee composed of Durward W. Maynard, Chairman; Wallace H. Spalding and John T. Ballantine having tendered a written report recommending to the Board of Governors that the respondent be adjudicated guilty of unprofessional conduct and be administered a three-year suspension, on motion duly made and seconded the report was ordered filed.

On call of the roll, the respondent was adjudicated guilty as charged by a roll call vote of 10-0. Two (2) governors passed. Upon a second call of the roll by a vote of 9-3, it was recommended that the respondent be suspended from the practive of law for a period of six months.

IN RE: JUDY WARD SMITH
FINDINGS AND RECOMMENDATION OF THE BOARD OF GOVERNORS

The above case having been called and a report

having been submitted and the matter having been fully considered, the following findings and recommendation are made:

FINDINGS

That the respondent, Judy Ward Smith, be adjudicated guilty as charged.

RECOMMENDATION

It is respectfully recommended to the Court of Appeals of Kentucky that the respendent, Judy Ward Smith, be suspended from the practice of law in the Commonwealth of Kentucky for a period of six months and required to pay the costs of this action.

This 14th day of July, 1972.

/s/ William E. Rummage
WILLIAM E. RUMMAGE
President

/s/ Henry H. Harned
HENRY H. HARNED
DIRECTOR

RULE TO SHOW CAUSE
July 21, 1972

RULE

ON

FINDING AND RECOMMENDATION

OF THE

BOARD OF GOVERNORS

OF THE

KENTUCKY STATE BAR ASSOCIATION

THE COMMONWEALTH OF KENTUCKY,

To the Sheriff of Warren County, GREETINGS:

The Board of Governors of the Kentucky State Bar Association having filed its finding and recommendation in the matter of

KENTUCKY STATE BAR ASSOCIATION — COMPLAINANT

versus

JUDY WARD SMITH — RESPONDENT

recommending that said Respondent be suspended from the practice of law in the Commonwealth of Kentucky for a period of six months, you are hereby commanded to summons Respondent to appear before the Court of Appeals, Frankfort, Kentucky, or file due response within 20 days after the service of this sum-

mons, and show cause, if any he has or can, why the recommendation of said Board should not be enforced by appropriate orders of the Court, and warn him that upon his failure to answer, the Rule herein shall be made absolute and you will make due return of this summons immediately upon the execution thereof. Issued at Frankfort, Kentucky, this the 21st day of July, 1972.

FRANCES JONES MILLS
CLERK, COURT OF
APPEALS

BY /s/John C. Scott
John C. Scott
Chief Deputy Clerk

* * * * * * *

EXCERPTS FROM DEPOSITION OF PETITIONER
October 8, 1971

* * * * *

[8] MR. SPALDING: Well I think you missed a part in the prior hearing that was concerning itself to the money and where it actually went, if you -know, and concerning your husband and his demise, and I think this should be placed at this point.

A. All right. Its my belief that this money was obtained from Mrs. Sally Fugate by my late husband, James Allen Smith, who died August 29, 1970. I have a copy of this check made to me, as escrow agent, signed by Mrs. Sallie Fugate, endorsed on the other side in my name, as escrow agent, I did not write that check.

I believe that Jim did and I offer to this committee for your consideration a check that had been called to my attention shortly after we moved away from Hazard. This is a court cost check which was endorsed over to me by the Credit Bureau, I was their attorney on retainer, and this is an example of where this check was not taken to a bank, but it was taken to a merchant outlet and he endorsed my name and his name on it. His name does not appear on the Fugate check [9] because it was taken directly to the bank, this was taken to a mercantile outlet, and they did not require, I mean the check was taken to the bank and they didn't make him endorse it at his bank.

Q. 1 Were they cashed or deposited?

A. Both of those checks were cashed.

Q. 2 Were they at the same bank that you generally do business?

A. No, they were taken to the one that was cashed on the, you know, made to me on the escrow agent, that was cashed at the Citizens State Bank of which my husband had a small account there and I did all of my banking with the People Bank in Hazard, Kentucky.

MR. BALLANTINE: Would you write — what is your normal signature?

A. J. Ward Smith.

Q. 3 Would you sign your name a couple of ties on that sheet of paper (indicating)?

A. Yes sir, (indicating four times).

Q. 4 Did you tell us the last time that there was some other episode involving another check that you learned of something about your husband getting other check proceeds?

A. Right. There was a check made payable to me and a Hensley gentlemen, and I could not obtain a [10] copy of that check, so the only other check I could find was in Hazard because Mr. Burke, the signor on the check had moved to Danville and sold out his automobile agency. It was a check for $480 some odd dollars and this check had been endorsed and cashed by Jim, and brought to my attention and I had to reimburse a man on that before we even left Hazard, Kentucky, so he was suffering from a pit-

uitary tumor at that time and he was not employed and he had lost his job in December of 1968, after taking funds from Reynolds Tobacco Company that did not belong to him, and he more or less had been trying to sell insurance and we had been — and he had gone to Western University for summer school session, and it just came to a point where he was giving huge checks on me and more or less putting my personal account in jeopardy at the bank, so I could not get a copy of that check, but I did get a copy of that other check.

Q. 5 Would you tell us and put into the record briefly, and I don't want you to get yourself upset, but briefly put in the history that your husband followed after the discovery of the existence of the pituitary tumor and his pattern of behavior?

A. Yes. From December, 1968, until the date of his death in August of '70, he gained approximately 50 pounds. He slept most or a lot of the time. I'll [11] say 14 to 16 hours a day. He did not work at any occupation. He was given — he already had an insurance salesman's license and he was supposed to be selling insurance and he would go out and not come home for days, and I would ask him where he had been, and he would say it was none of my business, and he gave checks to certain Hazard business men presumably for gambling debts which I took care of. He became extremely jealous of me and our young son, and he left twice that I can remember, and went to his parents' home in Bowling Green, Kentucky, and more or less he just, he was just not the

same person, having no responsibility for anything, financially, socially, or anything. He was liable to say anything to anybody at any time. I knew he was sick but I did not know it was a physical tumor but I thought he was having some sort of a breakdown and I asked him repeatedly to go see a psychiatrist or a doctor because I thought he was sick, and that he should go but he refused, and he said there was nothing wrong with him, and he would have just, what I would call just fits of anger, and he was leaving the house and not coming back for 2 or 3 days at a time. And I never knew where he was or what he was doing, and he went to the bank one time and drew out $200 from our personal account and I didn't know whatever happened to that money. And then we moved to Bowling Green, like I told you a few moments ago in December of '69, and we lived together until March. And at that time he told me after the indictment, he said, "I fixed you, you won't practice law much longer in the State of Kentucky." And he said, "Tell me what prison do they send women to in Kentucky, Eddyville or LaGrange?" And I left that night, and I went to my parents house and that was in March of '70, and I have been there ever since. I filed divorce proceedings in the Warren Circuit Court and that was still pending at the date of his death.

MR. BALLANTINE: When did you all find out about the tumor, roughly, was it after you had moved to Bowling Green?

A. Right, right. It was roughly in July of '70.

Q. 6 Shortly before his death?

A. Right. After they diagnosed his condition as a tumor they would not let him leave the hospital because they thought he would have another black out and they operated on him and he never came out of surgery.

Q. 7 Did you all — well how long had you been married?

A. 7 years.

Q. 8 And during the first years of your marriage had he ever behaved similarly to that?

A. We married in September of '63, and I had just graduated from college and Jim was in the Air Force in Oklahoma and he was having abdominal pains and other related — never headaches, but abdominal pains and I took him to the base hospital several times and in the spring of '64, and they more or less decided that he was a hypochondriac, and they sent him to a psychiatrist at the Air Force base, Sheppard Air Force Base down there, at Wicitaw Falls, and then his parents came out there then that next summer and he seemed to get better after that, and the first two or three years were very happy years. He was in the Air Force and I worked for a local finance company and then he just — I don't know, his personality started changing, argumentative and the least little thing would set him off, you know, and I came back to Kentucky to go to law school which

he was going to finish up his last year in the service and I was going to put him through his remaining year of college when he got out and he wanted to go to law school, and we felt like with the government allotment coming in and we had a little bit saved, that we would just more or less spend our money in some way to perpare ourselves for the future, so anyway I came back and went to law school, and I was half way through law school when he got out of the Air Force. He started to work then for an insurance company and he worked there for six months, and then another insurance company for six months and then he got this job with R. J. Reynolds Tobacco Company and that's when we moved to Hazard, Kentucky, and that is where I was in the private practice of law.

Q. 9 Did he ever at any time other than this comment about fixing you and you would never practice law again in Kentucky, or some quote like that, did he ever directly say, or admit that he had signed your name on either of the two checks or the other stuff you have produced?

A. The court costs check he did admit, yes.

Q. 10 Did you ever specifically ask him about the Fugate check?

A. No I didn't. We were separated at that time after — well actually we were — the indictments were returned in February and we separated in March, and I never did ask him specifically about that check, no.

Q. 11 Did any doctor or hospital personnel ever give you an estimate of how long the tumor had been existent?

A. They said he probably had it since [15] early childhood but had been activated within the last 2½ to 3 years.

Q. 12 I see.

A. They told me that a person suffering from this type of tumor has a complete change of personality. That they sometimes turn against the people that they love the most or their families and that they have lapses where they do things they don't remember that they have done, or what they have said, and when he came out of the surgery, you know, that I would have to be very patient with him because there was a long period of therapy connected with a condition of this type, and said that his hormones, his whole growth system in his body, they said had been greatly altered and approximately one half of his brain was not working. And they found this out you know from the EEG that they ran, and that is how they determined that I mean.

* * * * *

[20]

Q. 32 Did you ever receive any compensation fee for services rendered from Mrs. Fugate?

A. No I did not.

Q. 33 Does she still live in Perry County?

A. Yes she does and incidentally you asked me at the last hearing to furnish the court with a copy of the settlement in the cases filed, and the final settlement and its very interesting because I called the Clerk in the Perry Circuit Court and asked her to send me a photocopy of the final accounting, and she said that one had not been filed. In other words, this whole thing is still pending and open as far as the Circuit Court suit to settle the estate is concerned, either Mrs. Fugate, neither Mrs. Fugate nor Mrs. Odessa Fugate Jones have neither one made any effort to go on and settle this estate.

Q. 34 Do you recall the style of that case?

A. Mrs. Sallie Fugate vs Odessa Fugate Jones and Corbett Hogston, Surety.

Q. 35 Do you appear in the record in that action as counsel for Mrs. Fugate?

[21]

A. Yes I do.

Q. 36 Have you been discharged as counsel?

A. The day what I obtained the release from her and paid her this money I sent her a copy of my motion to withdraw as her counsel.

Q. 37 To your knowledge, was that order answered?

A. Yes.

MR. BALLANTINE: Thank you.

MR. MAYNARD: Mrs. Smith, do you know who prepared this exhibit 4?

A. The deed itself?

Q. 38 Yes ma'am.

A. No I do not.

Q. 39 Where did you get the deed from which is the photocopy that was made?

A. That is straight from the County Clerk's office, the Perry County, Earl Dean is his name, and I wrote him and asked him to send me a photocopy of the deed as entered in the record book, and he sent me that.

MR. BALLANTINE: Well then our discussion concerns the lack of an endorsement on this deed that is Exhibit 4, and on Exhibit 5, I don't see prepared by — yes, it does have prepared by, excuse me.

[22]

A. I always do every deed that way, you have to, you know, you have to sign your name on it and state who it was prepared by.

Q. 40 Do you have any idea where this Exhibit 4 was prepared?

A. No I do not. It doesn't even look like a deed, I mean, it has the habendum, you know, and the consideration, and the description but there are parts of it that don't even sound like a deed to me.

Q. 41 Have you seen the original that has Don A. Ward's signature on it?

A. Yes I have.

Q. 42 Has a signed name of Don A. Ward I mean?

A. Right.

Q. 43 Do you recognize the hand in which it is written?

A. No. It looks a great deal like Judge Ward's signature but I cannot say it is or isn't.

Q. 44 Have you ever talked to him?

A. Yes. He told me that it isn't.

Q. 45 That it is not?

A. That is not his signature, that's right.

Q. 46 Did you sign it?

A. No.

[23]

Q. 47 Is there anything else you want to say in your response to these charges or this charge, excuse me?

A. Just this, that I did not take this money from Mrs. Sallie Fugate and that I did not sign any deed with Judge Don A. Ward's name on it and I certainly did not take any deed out of the Perry County Clerk's office, and I think we got everything in we had the last time. And if you all remember anything else, please bring it to my attention because to the best of my knowledge, I have now put everything in again.

MR. BALLANTINE: I don't remember anything else, I think you covered everything.

MR. SPALDING: If you will, Mrs. Smith, if

you will look at this Exhibit 1, it has the signature of Mrs. Fugate, do you recognize that signature?

A. No I do not.

Q. 48 The Citizens State Bank at Hazard, Kentucky seems to be the bank account on which this was drawn, did you have any of Mrs. Fugate's checks in the file when you were handling the estate there towards the end, so that such a check could have been taken from your file?

A. No, no I did not.

Q. 49 Did you write the name J. Ward Smith, [24] Escrow Agent, and the amount on that check?

A. No I did not.

Q. 50 Did you have available to your husband the files in your office or at your home so that he could have known that $632.72 was to go to you for some reason?

A. I did not keep any file in my home. I think this is one thing at the last hearing. My office had been broken into one time and the files had been opened and I never suspected Jim that got into it, but some other person possibly had broken into it at one time, but I never had any checks signed by Mrs. Fugate left to me for any purpose and there was never any Escrow set up. We did discuss it and I did recommend if they wanted to we could do it this way. But she was going to Dayton, Ohio and didn't want to set it up this way. And she said that she would just go ahead and pay Odessa and I said, "All right." And

didn't even — $507.48 was the amount that she was to give her.

Q. 51 How much fee did you charge her for what you had done when you said that you had closed it out?

A. $150.

MR. BALLANTINE: Do you know where Mrs. Fugate is living now?

A. She's in Hazard.

Q. 52 Have you ever talked with her about that check?

[25]

A. No I have not.

Q. 53 That check being Exhibit #1.

A. No, no, I never have.

MR. SPALDING: Was your husband competent on August 22, 1969, to a point of where he could consider, in your opinion, which I understand is just a layman's opinion, but you did live with him, that he would know what to do to make such a check as this payable to an Escrow Agent?

A. Oh yes, yes, he was certainly capable. You mean did he have enough sense to do or to know how to do it?

Q. 54 Yes.

A. Yes.

Q. 55 Where did he get that information?

A. Jim knew a great deal about the law because

at one time he wanted to go to law school, as I told you earlier. And I'm sure I know that he has looked through all of my form books as far as that is concerned. And he would have enough knowledge to know how to put something like that together if that is what you mean. The knowledge that he absorbed, plus the fact that we went to many parties and you know how it is in law school, you discuss everything at these parties about what you have had in class and so I think he absorbed a great deal [26] of knowledge through discussions and then he would sometimes come and go to the library while I was studying and things like that, and I think he had enough knowledge of a lay nature to do something like that.

* * * * *

[27]

Q. 66 Did he know Mrs. Fugate?

A. Yes he knew Mrs. Odessa Fugate Jones, also, because when he worked for the R. J. Reynolds Tobacco Company Odessa was the display girl at Magic Market which is one of the local stores, and they worked together in setting up these things and displaying merchandise and things.

Q. 67 Now Sallie Fugate was your client?

A. Right.

[28]

Q. 68 But the administratrix of the will of the estate of Everett Lee Fugate was Odessa Fugate Jones?

A. His widow.

Q. 69 Whose widow?

A. Everett Lee Fugate's widow.

Q. 70 Oh.

A. She remarried almost immediately.

Q. 71 I see. So that Odessa Fugate Jones is Everett Lee Fugate's widow?

A. Yes.

Q. 72 And Sallie Fugate was what?

A. His mother, Everett Lee Fugate's mother.

Q. 73 I see. And the check apparently is out of the money, the money actually came from Sallie Fugate's estate?

A. Yes.

Q. 74 She, or at least Sallie Fugate's checking account?

A. Right.

Q. 75 Does the estate or the real estate purchase, Everett Lee Fugate estate, would this, as it appears on the face, indicate that $632.72 as being paid by Sallie for something out of that estate to you?

A. Well that is the way that I interpret a check like that, yes.

[29]

Q. 76 Now then if it was made payable to J. Ward Smith, as Escrow Agent, was it the contention of the court that you had taken that money instead of putting it into the estate, had cashed it, had cashed it and absconded with the money, is that the charge?

A. Yes.

Q. 77 Did Mrs. Odessa Fugate Jones or did Mrs. Sallie Fugate, either of those two, contend in any way that this property was actually transferred and that they had in fact paid money for it?

A. No.

Q. 78 Do you know?

A. No I don't believe so. Now Mrs. Fugate contended that the property was transferred to her by Odessa and the Judge approved, yes, that was contended.

Q. 79 Did she say who she paid for it, or anything of this nature, or was were you given the advantage of any of her testimony?

A. No. I did not — they impaneled the jury and there was no testimony given and the Commonwealth attorney came in there and said, "I will reduce the charge and join you with a plea for a motion to dismiss these other charges if you will enter a plea to this." And we talked it over and my attorney advised me to do it, and I agreed with him, and I don't think that there was ever [30] any testimony ever given.

Q. 80 Now at any time did your attorney or you approach Sallie Fugate and ask her if she gave that check to anyone?

A. No.

Q. 81 Did the indictment indicate that she was the one who had certainly been aggrieved, and certain-

ly lost the money, but had she made any statement or anything about it?

A. No. Odessa Fugate Jones was the one saying she had not received the money for the property that was conveyed. She was the one that went before the Grand Jury.

Q. 82 All right. Then if she went before the Grand Jury and Sallie Fugate already had the property from this other deed that you brought to us.

A. Yes.

Q. 83 Had anyone that you know of asked Sallie Fugate if she actually paid for the — that is, under the agreement to pay for it, did anyone ask her that?

A. Not to my knowledge, no.

Q. 84 Do you think that would be of any advantage to you to find out, I mean, I think we ought to be able to get that information outself if she can't [31] find out.

A. Well I have Grand Jury testimony right here (indicating), and she said she paid that money to me.

Q. 85 Mrs. Sallie Fugate?

A. Yes, paid this money to me.

Q. 86 Directly?

A. Yes sir.

Q. 87 Individually?

A. Yes, she said the check was made out to me.

Q. 88 All right. Who wrote the check?

A. She said that I did in that transcript.

Q. 89 Now I believe I asked this before, or at the other time, at the time of August 22, 1969, were you having any kind of mental problems?

A. I was upset emotionally, but no, I wasn't having any lapses of capability or anything like that.

Q. 90 You would know if you wrote the check?

A. I certainly would.

Q. 91 Would it have been so that you would have had anything in the nature of medication such as amphetamines or any alcoholic drinks that could have made [32] it so that you wouldn't know what you were doing?

A. No.

Q. 92 You have no recall at all of writing this check?

A. I did not write that check.

Q. 93 Did you know where Mrs. Fugate had her money?

A. No I didn't. For all I knew she might even not have had any.

Q. 94 Would your husband have had an opportunity to have determined that from some of his connections that you know of without guessing?

A. I just don't know, I couldn't answer a guestion like that.

MR. SPALDING: Thank you.

EXAMINATION

BY MR. MAYNARD:

Q. 95 Mrs. Smith, as far as now, is Sallie Fugate in possession of the property described in Exhibit 4 and Exhibit 5?

A. The last time that I was involved with this, yes, she was.

Q. 96 She claims that she has paid for it and therefore its her's?

[33]

A. Right. Now I'm sure on that, but at the last time, yes.

Q. 97 In Exhibit 4 and 5 it contends the contents is exactly the same, that is, in reading Exhibits 4 and 5, the contents are exactly the same up through the word, General Warranty, they're verbatim, comma for comma, and then on page 2 of Exhibit 4, there has been added the last paragraph where it states that Odessa Fugate Jones having been served with summons, et cetera, and below which is a line, and a name, Don A. Ward, Judge of the Perry Circuit Court, would you have any knowledge as to why this deed was lodged and this is Exhibit 4, was lodged twice in the office of the Perry County Court Clerk's office?

A. It disappeared the first, the first deed was taken, it was cut out of the deed book, and they called Mrs. Fugate into bring back the deed, you know, we have got to re-record it, so that is why this is the second recording of the thing.

You will note in this Grand Jury testimony of the

Clerk that recorded it said that I did not bring that, Mrs. Fugate took that deed from the Clerk's office, and had it recorded, an dsaid, that is the day the deed was removed, I had not been in that record room for probably a week or so, and she did not [34] recall me being there and I didn't have any reason to be there.

MR. BALLANTINE: Was this the only copy of the Grand Jury record?

A. No I have other copies, you can have those too.

MR. BALLANTINE: All right. We will mark this as Exhibit 6.

* * * * *

[42]

MR. SPALDING: Have you had anyone look at this for forgery as far as an expert is concerned?

A. I had Maxwell Allen look at this, $630 check to see if he could determine if that was my handwriting or not and he said he came down there to Hazard and examined it because of the quality of the [43] paper he said of the check he said that he could not testify one way or the other, and you know him, he's a a very upright person and he wouldn't testify one way or the other, he wasn't sure, that is what he said to me now.

Q. 141 It was just this that you were showing him this exhibit, that was a photocopy or the original?

A. The original of the check, and I showed him

Mr. Holland, went down to the clerk's office and got other papers that I had signed around this trying to compare all of these signatures and he said that he just was not sure.

Q. 142 Could your husband write similar to you?

A. Yes he could.

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EXCERPTS FROM DEPOSITION OF MAXWELL ALLEN
February 28, 1972

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[4]

Q. 6 Is it true that because of the quality of the papers that these documents were on, that you could not make any determination as to whether the signatures were all made by the same person?

A. No. Again my recollection, I was there in behalf of Mrs. Smith. These attorneys were defending Mrs. Smith and after, and I also examined the originals, the original documents as to be able to study the line quality and as I recall, I told this young lawyer that I would not be able to do Mrs. Smith any good after my analysis.

That I would have to make some very damaging concessions on her part and therefore I was not [5] used as a witness.

Q. 7 So you were, the fact that you were not used as a witness was not due to your inability to make an evaluation of these handwriting samples, is that correct?

A. That is my impression, correct.

Q. 8 And in your opinion were the signatures, the endorsements on the checks that you were shown, the same as the known handwriting of Mrs. Smith?

A. Purported signatures of, and handwriting of Mrs. Smith at that time compared favorably with that on the checks.

MR. CORYELL: I have no further questions.

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